

## ENVIRONMENTAL PROTECTION AGENCY

[FRL-     ]

### **Notice of Availability and Request for Public Comment: Proposed National Pollutant Discharge Elimination System (NPDES) General Permit for Discharges of Storm Water Discharges from Construction Activities in Indian Country within the State of Wisconsin**

**AGENCY:** U.S. Environmental Protection Agency, Region 5 (EPA).

**ACTION:** Notice and request for public comment.

---

**Summary:** Today's notice announces EPA's intention to issue a National Pollutant Discharge Elimination System (NPDES) general permit for storm water discharges from construction activities in Indian country within the State of Wisconsin. The general permit is proposed to cover discharges within Indian country, including the following areas: Bad River Indian Reservation, Forest County Potawatomi Indian Reservation, Ho-Chunk Nation Indian Reservation, Lac Courte Oreilles Indian Reservation, Lac Du Flambeau Indian Reservation, Menominee Indian Reservation, Oneida Indian Reservation, Red Cliff Indian Reservation, Sokaogon (Mole Lake) Indian Reservation, St. Croix Indian Reservation, and the Stockbridge-Munsee Indian Reservation.

Section 402(p)(2)(B) of the 1987 Clean Water Act requires NPDES permits for storm water discharges associated with industrial activity. Sources regulated include discharges from municipal separate storm sewer systems with populations of generally 100,000 or more and 11 categories of industrial activity. EPA has defined storm water discharges associated with industrial activity to include storm water discharges from construction

sites which disturb 5 or more acres (see 40 CFR 122.26(b)(14)(x)). This formed the basis of Phase I of the national storm water regulations.

On December 8, 1999, EPA published Phase II of the national storm water regulations. Phase II regulates storm water discharges from small municipal separate storm sewer systems and discharges associated with small construction activity, including construction sites which disturb between 1 and 5 acres (40 CFR 122.26(b)(15)(i)). The proposed permit will address construction sites regulated under both the Phase I and Phase II Rules. However, the requirements for small construction sites will not be effective until March 10, 2003, the date by which these sources are to comply with the Phase II storm water regulations. The Intermodal Surface Transportation Efficiency Act (ISTEA) of 1991 postponed the Phase I permitting deadline for any storm water discharge associated with industrial activity (which includes construction activity) that is owned or operated by any municipality with populations less than 100,000, except for a discharge from an airport, powerplant, or uncontrolled sanitary landfill. Originally, EPA codified the ISTEA amendments by “reserving” permit application requirements. In the Phase II rules, however, EPA established that deadline as March 10, 2003. Construction storm water discharges that are owned or operated by Indian tribes are included in the ISTEA exemption because CWA section 502(4) defines “municipality” to include “an Indian tribe or an authorized Indian tribal organization.” Thus, Tribes are not required to apply for permits for their construction activities until the March 10, 2003 deadline.

EPA invites public comment on the provisions of the draft permit within the public notice period established by this notice. In addition, EPA will hold several public meetings and a public hearing to discuss the proposed permit. The dates and locations are listed below:

Date: January 9, 2002

Location: University of Wisconsin

Director's Room 4151

Grainger Hall

975 University Avenue

Madison, WI 53706

Time: 1:00 p.m. to 3:00 p.m.

Date: January 17, 2002

Location: Bay Beach Wildlife Sanctuary

Auditorium

1660 East Shore Drive

Green Bay, WI

Time: 5:00 p.m. to 7:00 p.m.

Date: January 29, 2002

Location: Marathon County Public Library

Wausau Room

300 First Street

Wausau, WI 54403

Time: Public Meeting 3:00 p.m. to 5:00 p.m.; Public Hearing 6:00 p.m. to 8:00 p.m.

If the library is closed due to bad weather, the public meeting and public hearing will be rescheduled for February 5, 2002, at the same times as listed above.

These meetings will also be posted on the Region 5 Storm Water Website

([www.epa.gov/r5water/npdestek/npdstma.htm](http://www.epa.gov/r5water/npdestek/npdstma.htm)) and in one or more newspapers of general circulation within the state. Copies of the draft general permit and an accompanying fact sheet may be obtained by contacting EPA at the following telephone number or mailing address: Brian Bell, (312) 886-0981, NPDES Programs Branch (WN-16J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, IL 60604.

Electronic copies of the draft permit and fact sheet may be viewed at the Region 5 Public Notice Page

([www.epa.gov/r5water/npdestek/npdcfrp.htm](http://www.epa.gov/r5water/npdestek/npdcfrp.htm)) or the NPDES Page

([www.epa.gov/r5water/npdestek/npdnpda.htm](http://www.epa.gov/r5water/npdestek/npdnpda.htm)). Users with appropriate software capabilities may also download electronic versions of these documents.

**Dates:** Comments on the draft permit must be received by February 5, 2002. EPA will accept comments submitted in writing or transmitted electronically.

**Addresses:** Comments on the draft permit may be sent to: Brian Bell, NPDES Programs Branch (WN-16J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, IL 60604. Comments may also be transmitted electronically to *bell.brianc@epa.gov*.

**For Further Information Contact:** Brian Bell, at the above address or, via telephone at 312-886-0981.

### **Supplementary Information:**

#### **I. Background**

The State of Wisconsin has previously been authorized by EPA to issue NPDES permits outside of Indian

country, and has issued general permits to regulate the vast majority of construction site storm water discharges outside Indian country within the State of Wisconsin. USEPA retains the authority to issue NPDES permits within Indian country within the State of Wisconsin. Indian country means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of the State, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. See 18 U.S.C. 1151.

## II. National Historic Preservation Act

The National Historic Preservation Act (NHPA), 16 U.S.C. 470a et seq., generally requires, among other things, that Federal agencies take into account the effects of their undertakings on historic properties. Section 106 of NHPA seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation among the agency official and other parties with an interest in the effects of the undertaking on historic properties. The goal of this consultation process is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties. See 65 FR 77698, 77725 (December 12, 2000).

Under Section 106, EPA must complete the consultation process “prior to the issuance of any license.” See 36 C.F.R. 800.1(c). EPA has interpreted this language to apply this requirement to the issuance of today’s proposed general NPDES permit for Indian country in Wisconsin. EPA is, therefore, conducting a Section 106 consultation regarding issuance of the proposed general permit.

Several parties have consultative roles in the Section 106 process that EPA is conducting for this

proposed permit for Indian country in Wisconsin. These include (1) the Tribal historic preservation officer (THPO), for a tribe that has assumed such responsibilities under section 101(d)(2) of the NHPA, 16 U.S.C. 470a(d)(2); (2) the State historic preservation officer (SHPO); (3) designated representative(s) of an Indian tribe where a tribe has not assumed responsibilities of a SHPO.

In the process of preparing the proposed permit for Indian country in Wisconsin, EPA considered several possible options for meeting Section 106 of the NHPA. EPA conducted a series of consultations with the Wisconsin tribes (including THPOs and designated tribal government officials) and the Wisconsin SHPO. The consultation was conducted in a series of telephone conference calls held on February 13, February 22, March 13, and March 29, 2001.

During the consultation process, participants raised several concerns. These concerns included (1) the need for an understanding of technical and operational aspects of NPDES general permits; (2) the need for timely notice in advance of planned development projects; (3) the need for sufficient time and resources to complete historic property surveys; (4) the need to define the role of the SHPO, Tribe or THPO in the process for addressing effects on historic properties as applicants seek coverage under this NPDES general permit; (5) the need for a defined process to address potential effects on historic properties in the event of inadvertent discovery of historic properties after construction of a particular project covered under this general permit has begun; (6) the need for a consistent process to document how effects on historic properties have been addressed; (7) the need to streamline the coordination process for addressing effects on historic properties consultation across multiple, similar projects and similar geographic locations.

During the consultation, EPA explained the technical and operational requirements of the general permit, and stated that EPA is seeking information to develop a systematic process that would allow for comprehensive screening for historic properties, but also that would be sensitive to the different processes used by the THPOs, Tribal officials, and the SHPO.

Participants were concerned about an initial option proposed by EPA which would have included in the proposed general permit a precondition for coverage against discharges impacting historic sites, but without a requirement that the permit applicant seek a certification from the THPO or SHPO.

Participants were also concerned about a second option proposed by EPA which would have included in the proposed general permit a precondition for coverage against discharges impacting historic sites, but including a certification from the THPO, Tribe or SHPO. The concerns focused on the lack of a defined process and whether there would be sufficient time and resources to conduct site surveys to identify historic properties.

Participants also reviewed a third option proposed by EPA, which would provide a choice of means to provide certification, similar to the approach used in EPA's Region 4 general permit. *See* 63 FR 15622 (March 31, 1998). Concerns raised by participants on this approach focused on how the different options for meeting historic property review eligibility requirements could be most clearly defined so that permit applicants would be able to easily understand and meet these requirements.

As a result of the concerns raised during the consultation process, EPA proposed that the general permit include a performance-based standard that the applicant would not be eligible to apply for permit coverage until the applicant had coordinated with the appropriate official(s) (THPO, SHPO and/or tribes) to identify historic properties and to assess and attempt to resolve any adverse effects. This pre-certification provision was designed to address the THPO, SHPO, and tribes' concerns that they generally lacked sufficient notice of a proposed development project to conduct the necessary review and coordination on impacts to historic properties. Concerns were also raised during consultation that applicants be informed of the appropriate procedures that would apply to coordinating the review of effects on historic properties in this option. In response to these concerns, EPA proposed that the general permit would include specific references to relevant provisions of the Section 106 regulations (36 C.F.R. §§ 800.4-800.6, 800.13) to ensure that the regulated community was specifically informed of the pre-certification procedures they would need to meet in order to be

eligible for coverage under the general permit. Under this option, the relevant procedures in the referenced provisions regarding coordination with local officials would guide applicants in coordinating with the THPO, SHPO and/or tribes to identify historic properties and to assess and attempt to resolve any adverse effects on such properties. The proposed permit would authorize such activities so long as the proper pre-certification procedures had been followed by the applicant.

In this option, which is the option included in today's proposed general permit, in order to be eligible for coverage under the general permit, applicants would need to certify that they had coordinated with the appropriate THPO, SHPO and/or tribal official consistent with the relevant procedures of the Section 106 regulations. The proposed permit would require that the applicant provide evidence of prior screening for the presence of historic properties and develop a mitigation plan, as needed, in coordination with the appropriate officials consistent with the relevant provisions of the Section 106 regulations. Finally, in the event of an inadvertent discovery of an historic property on the site during construction, the permittee would be required to immediately stop construction activity and coordinate with the appropriate THPO, SHPO and/or tribal official consistent with 36 C.F.R. § 800.13.

As part of its Section 106 consultation process on this proposed general permit, EPA invites all interested parties to comment on this option. Information regarding EPA's consultation process and the other options generally described above, is available on request from the address at the beginning of this notice.

### III. Coastal Zone Management Act (CZMA)

The Coastal Zone Management Act (CZMA), 16 U.S.C. 1451 et seq., establishes a scheme whereby states develop a Coastal Zone Management Plan to protect coastal areas within their jurisdiction. Section 307(c) of the CZMA requires that Federal agencies determine that various Federal activities are "consistent with the



enforceable policies of approved State management programs” to the maximum extent possible. *See* 16 U.S.C. 1456(c)(1)(A).

The CZMA and its implementing regulations distinguish between different kinds of Federal activities. Section 307(c)(3) of the CZMA requires a consistency determination for a Federal “license or permit.” *See* 16 U.S.C. 1456(c)(3). The CZMA implementing regulations promulgated on December 8, 2000 (65 FR 77124), provide that a general permit program, which does not involve case-by-case approval by the Federal agency, can be addressed as a “federal activity” under Section 307(c)(3) of the CZMA. *See* 15 C.F.R. 930.31(d).

Pursuant to these regulations, “When proposing a general permit program, a Federal agency shall provide a consistency determination to the relevant management programs and request that the State agency(ies) provide the Federal agency with conditions that would permit the State agency (defined at 15 C.F.R. 930.18) to concur with the Federal agency’s consistency determination. State concurrence shall remove the need for the State agency to review future case-by-case uses of the general permit for consistency with the enforceable policies of management programs.” *See* 15 C.F.R. 930.31(d).

The regulations further provide that should the State object to the general permit or should the general permit not incorporate State conditions to the maximum extent practicable, the Federal agency shall notify potential users of the general permit that the general permit is not authorized for that State unless the State agency concurs that the activity is consistent with the State’s management program. In that case, applicants would provide the State agency with their own consistency certification under the CZMA. *See* 15 C.F.R. 930.31(d).

According to NOAA regulations and Wisconsin’s Coastal Management Program, lands held in trust by the United States are excluded from the coastal zone area. *See* 16 U.S.C. 1453(l); 15 C.F.R. 923.33(a); Wisconsin Department of Administration, Wisconsin Coastal Management Program: Strategic Vision for the Great Lakes, [WCMP], June 1999, Section C, Federal Consistency. Issuance of NPDES permits currently is not

included in Wisconsin's list of federal permits requiring consistency certification. See WCMP, Section E. However, the regulations provide that a consistency determination is still required when any "spillover" impacts may affect the coastal zone.

EPA believes that today's proposed permit is unlikely to have spillover impacts that may affect the coastal zone as defined in the WCMP. See WCMP at Section C.1(a). Permittees would be required to follow their storm water management plan, which includes erosion and sediment control best management practices and perimeter controls tailored for the particular construction site. These controls are supposed to bring discharges into compliance with applicable water quality standards within Indian country and state water quality standards when discharges leave Indian country. The proposed general permit is consistent with the technical and operational standards of the State's WPDES permit program. Based on EPA's analysis of the WPDES permit requirements, and the WCMP, EPA believes that the proposed permit would be "consistent to the maximum extent practicable with the enforceable policies of approved State management programs" as specified in Section 307(c)(1) of the CZMA. See also 15 C.F.R. 930.32(a)(1).

Under 15 C.F.R. 930.41, the State agency has 60 days from today's notice to inform EPA of its agreement or disagreement with this consistency determination. EPA invites comments on its application of the CZMA to today's proposed permit.

#### IV. Economic Impact (Executive Order 12866)

Under Executive Order 12866 (58 FR 51735 (October 4, 1993)), the Agency must determine whether the regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may have an annual effect on the economy of \$100 million or adversely affect in a material way the economy, a sector of the

economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. EPA has determined that the issuance of this general permit is not a "significant regulatory action" under the terms of Executive Order 12866 and is therefore not subject to formal OMB review prior to proposal.

#### V. Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments)

Executive Order 13175, entitled “Consultation and Coordination with Indian Tribal Governments” (65 FR 67249, November 6, 2000), requires EPA to develop an accountable process to ensure “meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.” The term “policies that have tribal implications” is defined in the Executive Order to include Agency actions that have “substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.”

EPA has concluded that this proposed general permit may have tribal implications within the meaning of Executive Order 13175. EPA believes that the proposed general permit, however, does not impose substantial direct compliance costs on tribal governments or preempt tribal law. Overall, EPA expects that the impact of the proposed general permit on tribes will be positive. EPA's current NPDES permitting option for Indian country within Wisconsin is to issue individual permits. Issuance of this proposed general permit will provide EPA another NPDES permitting option for discharges of storm water associated with construction activity in

Indian country. EPA anticipates that the availability of the general permit will promote better compliance with NPDES requirements in Indian country, thus improving water quality. Moreover, beginning in March of 2003, tribes will be required to comply with existing NPDES permit requirements. The proposed general permit will, in some situations, allow tribes to obtain a permit for discharge of storm water from construction sites more easily and quickly.

Consistent with EPA policy, EPA consulted with tribal leaders to ensure that they had meaningful and timely input into the development of this proposed general permit, as well as to provide comments to EPA on particular provisions in the proposed draft permit. EPA consulted with representatives from tribes located in Wisconsin on December 19, 2000, February 13, February 22, March 13, and March 29, 2001. During the consultation process, participants raised several concerns. These concerns included (1) the need for an understanding of technical and operational aspects of NPDES general permits; (2) the relationship of the proposed general permit with other federal general permits issued by EPA; (3) the need for timely notice in advance of planned development projects; (4) the need for timely inspections and enforcement for potential violations of NPDES permit requirements; (5) the need for greater tribal involvement in permit issuance in Indian country; (6) the need for sufficient time, resources, and efficient process to undertake historic property surveys and otherwise ensure that permit applicants would comply with regulations protecting historic properties.

During this consultation, EPA explained the function and provisions of the proposed general permit, and explained the relationship between the proposed general permit and other federal general permits issued by EPA. EPA also explained the technical provisions of the proposed permit, including requirements which applicants would need to complete prior to filing a Notice of Intent and certification that pre-application requirements had been met. EPA also considered tribes' desire to obtain more timely notice of proposed construction projects within Indian country, and included in the draft permit a provision that would require

permit applicants to send copies of the Notice of Intent form to both EPA's Region 5 office as well as the environmental department of the relevant tribe, in addition to mailing the notice to EPA's national office. EPA also included a recommendation in its fact sheet for the proposed permit that encouraged applicants to contact the relevant tribal environmental department as early in the planning stage as possible, with 90 days being the suggested minimum. EPA also addressed tribes' general concerns for greater tribal involvement in NPDES permitting by discussing how tribes could apply for and obtain federally authorized permitting authorities on their own through the "treatment as state" or tribal eligibility process outlined in Section 518 of the Clean Water Act. EPA explained that the proposed general federal permit was designed to provide direct implementation of the federal NPDES permit program in Indian country until such time as each tribe in Wisconsin could obtain a federally authorized permitting program of their own, if they so wished. Specific concerns raised by tribes regarding how regulations protecting historic properties may apply to the proposed general permit, as well as EPA's consultation with state and tribal officials on the application of the NHPA to today's action, are specifically discussed in this notice in the National Historic Preservation Act section.

EPA specifically solicits additional comment on this proposed general permit from tribal officials.

## VI. Unfunded Mandates Reform Act

Section 201 of the Unfunded Mandates Reform Act (UMRA), Pub L. 104-4, generally requires Federal agencies to assess the effects of their "regulatory actions" on State, local, and tribal government and the private sector. UMRA uses the term "regulatory action" to refer to regulations. (See, e.g., UMRA section 201, "Each agency shall . . . assess the effects of Federal regulatory actions . . . (other than to the extent that such regulations incorporate requirements specifically set forth in law)" (emphasis added)). UMRA section 102 defines "regulation" by reference to 2 U.S.C. 658 which in turn defines

"regulation" and "rule" by reference to section 601(2) of the Regulatory Flexibility Act (RFA). That section of the RFA defines "rule" as "any rule for which the agency publishes a notice of proposed rulemaking pursuant to section 553(b) of (the Administrative Procedure Act (APA)), or any other law. . ."

As discussed in the RFA section of this notice, NPDES general permits are not "rules" under the APA and thus are not subject to the APA requirement to publish a notice of proposed rulemaking. NPDES general permits are also not subject to such a requirement under the CWA. While EPA publishes a notice to solicit public comment on proposed general permits, it does so pursuant to the CWA section 402(a) requirement to provide "an opportunity for a hearing." Thus, NPDES general permits are not "rules" for RFA or UMRA purposes.

Nevertheless, EPA has considered the proposed general permit in light of UMRA's requirements. As noted elsewhere in today's notice, the proposed general permit is virtually the same as the NPDES general permits for construction that many construction operators have used over the past three years. EPA has determined that the proposed permit would not contain a Federal requirement that would result in expenditures of \$100 million or more for State, local and Tribal governments, in the aggregate, or the private sector in any one year.

The Agency also believes that the proposed general permit will not significantly nor uniquely affect small governments. For UMRA purposes, "small governments" is defined by reference to the definition of "small governmental jurisdiction" under the RFA. (See UMRA section 102(1), referencing 2 U.S.C. 658, which references section 601(5) of the RFA.) "Small governmental jurisdiction" means governments of cities, counties, towns, etc., with a population of less than 50,000, unless the agency establishes an alternative definition.

Under existing regulations, a permit application is not required until March 10, 2003, for a storm water discharge associated with construction activity where the construction site is owned or operated by a

municipality with a population of less than 100,000. See 64 FR 68780 (December 8, 1999). In any event, the requirements of the proposed general permit would not significantly affect small governments because most State laws outside Indian country already provide for the control of sedimentation and erosion in a similar manner as today's proposed general permit. The proposed general permit also will not uniquely affect small governments because compliance with the proposed permit conditions affects small governments in the same manner as any other entities seeking coverage under the proposed permit.

## VII. Paperwork Reduction Act

EPA has reviewed the requirements imposed on regulated facilities resulting from the proposed general permit under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 et seq. In a separate Federal Register Notice, EPA will propose, a revision to the current Information Collection Request (ICR) document (Approved by the Office of Management and Budget (OMB) OMB No. 2040-0188, expiration date of March 31, 2003) to account for the increased information requirements proposed in today's permit. EPA will publish the proposed ICR revisions in a separate Federal Register notice and EPA will submit the revisions to OMB for approval prior to issuance of the final permit.

## VIII. Regulatory Flexibility Act as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA)

The Agency has determined that the proposed general permit being published today is not subject to the Regulatory Flexibility Act ("RFA"), which generally requires an agency to conduct a regulatory flexibility analysis of any significant impact the rule will have on a substantial number of small entities. By its terms, the

RFA only applies to rules subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act ("APA") or any other statute. Today's proposed general permit is not subject to notice and comment requirements under the APA or any other statute because the APA defines "rules" in a manner that excludes permits. See APA section 551(4),(6), and (8).

APA section 553 does not require public notice and opportunity for comment for interpretative rules or general statements of policy. In addition to proposing the new general permit, today's notice repeats an interpretation of existing regulations promulgated almost twenty years ago. The action would impose no new or additional requirements.

Nevertheless, the Agency has considered and addressed the potential impact of the proposed general permit on small entities in a manner that meets the requirements of the FRA. EPA took such action based on the likelihood that a large number of small entities may seek coverage under the general permit if finalized as proposed. The proposed general permit would make available to many small entities, particularly operators of construction sites, a streamlined process for obtaining authorization to discharge. Of the possible permitting mechanisms available to dischargers subject to the CWA, NPDES general permits are designed to reduce the reporting and monitoring burden associated with NPDES permit authorization, especially for small entities with discharges having comparatively less potential for environmental degradation than discharges regulated under individual NPDES permits. Thus, general permits provide small entities with a permitting application option that is much less burdensome than NPDES individual permit applications.

## IX. Official Signatures

After review of the facts present in the notice printed above, I hereby certify pursuant to the provisions of 5 U.S.C. 605(b) that these general permits will not have a significant impact on a substantial



number of small entities.

Authority: Clean Water Act, 33 U.S.C. 1251 et seq.

Dated December 13, 2001

/s/

Jo-Lynn Traub

Director, Water Division, Region 5